No. 13,557

IN THE

United States Court of Appeals

For the Ninth Circuit

In the Matter of
ALBERT LEONARD, ARNOLD DAVIS, SIDNEY DAVIS and WILLIAM GITZES, copartners, jointly and severally, d/b/a Davis Furniture Co.
DOYLE FURNITURE CO., INC., a corporation
LACHMAN BROS., a corporation
HARRY FRANK, an individual, d/b/a Milwaukee Furniture Company
A. EUGENE PAGANO and M. DE CASTRO, copartners, jointly and severally, d/b/a Mission Carpet and Furniture Co.
FRANK NEWMAN CO., a corporation
SHAFF'S FURNITURE CO., a corporation
JOSEPH H. SPIEGELMAN and LEON SPIEGELMAN, copartners, jointly and severally, d/b/a San Francisco Furniture Co.
STERLING FURNITURE COMPANY, a corporation
JAMES F. WILEY and VERNA M. GARDNER, copartners, jointly and severally, d/b/a J. H. Wiley the Furniture Man

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Review and Set Aside Supplemental Decision and Order of the National Labor Relations Board After Decision by the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' OPENING BRIEF.

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Table of Authorities Cited

Statutes

Texts

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PETITIONERS' OPENING BRIEF.

JURISDICTION.

This case is once more before this Court upon petition of the aggrieved employers to review the supplemental decision and order of the Board. At the original hearing this Court directed that the Board should in the first instance render its decision on the disputed question between the parties, namely, whether a temporary lockout which is not a reprisal is *per se* an unfair labor practice. The decision of the Board on this point is now appropriately before this Court for review and decision.

The Board has rejected the reasoning of the United States Court of Appeals for the Seventh Circuit in the *Morand Brothers* case and the reasoning of this Court embodied in its original opinion in the above-entitled case and has concluded that a lockout by the employers for the purpose of counteracting the effectiveness of the strike called by the union is, in and of itself, an unfair labor practice.

The Board rests its decision upon the following grounds: First, it reasons that because a *discharge* of the employees for engaging in concerted activities is an unfair labor practice, it therefore follows that a *temporary lay-off* of the employees to offset the effectiveness of a strike is *also* an unfair labor practice, the Board saying:

> "But neither Section 8 (a) (1) nor Section 8 (a) (3) of the Act draws any distinction between a discharge and a lay-off, but proscribes *any interruption* of the employment relation when directed against protected concerted activ-

ity. No limitation of this broad proscription is warranted unless clearly required by other sections of the Act." (Italics ours.)

This attempt of the Board to obliterate the distinction between a discharge and a lay-off is not supported by authority or by reason. There is the same distinction between a discharge and a temporary lay-off as there is between an employee's quitting his job and engaging in a strike. A strike is a concerted withholding of services from the employer for the purpose of inducing the employer to accede to demands of the strikers and with the intention of returning when the demands are met. A quitting is a complete, permanent and final severance of the employment relation between the parties. There is obviously the same distinction between a temporary lay-off or lock-out and a discharge of the employees.

From the inception of this case the petitioners have freely conceded that a *discharge* of employees for engaging in protected concerted activities is in and of itself an unfair labor practice. In fact this is the exact decision of the United States Court of Appeals for the Seventh Circuit in the *Morand Brothers* case. That Court, however, as did this Court, drew a distinction between a discharge and a temporary lay-off, which the Board persists in ignoring. For the convenience of the Court we reproduce here a portion of the opinion in the *Morand* case:

"Concluding, then, that the Union, unable to agree with the Associations upon a satisfactory

contract, had a right to strike against Old Rose, or, for that matter, any or all of the Associations' members, it becomes important to determine what retaliatory measures were available to petitioners. Old Rose, of course, had a clear right to replace its striking employees. *Labor Board v. Mackay Co.,* 304 U.S. 333, 345. The other petitioners, we believe, could quite properly and realistically view the strike, as they did, as a strike which, though tactically against but one petitioner, was, in the strategic sense, a strike against the entire membership of their Associations, aimed at compelling all of them ultimately to accept the contract terms demanded by the Union. It follows that they had a right to counter the strike's effectiveness by laying off, suspending or locking out their salesmen, who were members of the striking Union and as to whom there was not then in effect any collective bargaining agreement. We so hold, not merely on the basis of the implied recognition, in the 1947 Amendment to the Act, Section 8(d) (4), of the existence of such a right, but because the lockout should be recognized for what it actually is, i.e., the employer's means of exerting economic pressure on the union, a corollary of the union's right to strike. Consequently, once petitioners had exhausted the possibilities of good faith collective bargaining with the Union through their Associations, any or all of them were free to exercise their right to lock out their salesmen without waiting for a strike, just as the Union was free to call a strike against any or all of them.

"In the instant case, however, the Board found that petitioners had not merely laid off or locked out but had discharged their employees. Although petitioners strenuously assert that this finding lacks substantial evidentiary support, they contend, in the alternative, that they had a right to discharge their employees when the Union struck Old Rose. With the latter contention we cannot agree; although it would seem that petitioners should be accorded the right to counter such a strike with a lockout, i.e., that they have a right to meet economic pressure exerted by the Union with economic pressure exerted on the Union, it is clearly settled that an employer's discharge of his employees because of their union affiliations or activities, strike activity included, is an unfair labor practice, violative of Section 8(a)(3) of the Act. *Labor Board v. Jones & Laughlin,* 301 U.S. 1; *Phelps Dodge Corp. v. Labor Board,* 313 U.S. 177, 183; *U.A.W. v. O'Brien,* 339 U.S., 454, 456-457."

It will be seen that the reasoning of the Board in its supplemental decision is a complete departure from the reasoning of the Court above set forth and also from the reasoning of this Court as set forth in its earlier opinion in this case.

The attempt of the Board to obliterate the distinction between a discharge and a lay-off cannot be supported by reason or by authority.

The Board's opinion in this case is inconsistent with the Board's own line of decisions frequently referred to as "the business necessity cases". To il-

lustrate the point we quote from the brief filed on behalf of the Board with this Court on the original hearing of this case at pages 16 and 17, reading as follows:

> "An employer faced with a threatened strike against himself may lawfully lock out employees if his motive in doing so is to protect his own economic interests. For example, in *Duluth Bottling Association,* 48 NLRB 1335, 1336, 1359-1360, the Board held that where a threatened strike against employers would result in a spoilage of their materials, the employers were entitled to guard against such loss by locking out their employees in anticipation of the strike. In *Betts-Cadillac-Olds, Inc.,* 96 NLRB 46; 28 LRRM 1509, the Board held that the union's refusal to tell employers when the threatened strike would occur warranted the employers in refusing to accept further orders and locking out their employees, since the employer's purpose was to guard against disappointing customers.
>
> "And in *International Shoe Co.,* 93 NLRB 159, 27 LRRM 1504, the Board held that an employer faced with the prospect of recurrent work stoppages which made it difficult for him to plan production, was entitled to lock out his employees where his purpose in doing so was to guard against economic loss."

We submit that this is a distinction without a difference. Furthermore, we submit that the Board is indulging in a species of judicial legislation. If the *strike* in each one of those cases was a *protected concerted activity,* and if the sweeping language of

the Board's supplemental opinion in this case is correct, namely, that Section 8(a)(1) and Section 8(a)(3) both proscribe *any interruption* of the employment relation when directed against protected concerted activity, then all these previous decisions of the Board are wrong.

The truth of the matter, of course, is that the Board is indulging in judicial legislation in reading into the statute its own ideas as to proper procedures to be followed by employers in the economic struggles arising out of impasses in collective bargaining, namely, that the lockout is legitimate to prevent spoilage of goods but is not legitimate to prevent the "whipsawing" described in the earlier opinion of this Court.

Next, the Board brushes aside the extended references in the opinion of this Court to the linking of the terms "strike" and "lockout" in Sections 8(d)(4), 203(a), 206, and 208(a), of the Act, and the suggestion of this Court that it is arguable that Congress intended to equate lockouts with strikes as "correlative economic powers". The Board reasons that the term "strike" and "lockout" are linked only where the particular activity is proscribed as unlawful and relies on the fact that no specific language can be found in the Act guaranteeing the right to lock out as the counterpart of the guarantee of the right to strike contained in Section 13 of the Act. The complete disregard by the Board of the entire legislative history of the Act is perhaps in and of itself the best illustration of the fallacious reasoning by which the

Board has concluded that the acts here involved are unfair labor practices. Where a statute provides a "cooling-off period" of sixty days and forbids either a strike or a lockout until the expiration of sixty days, it obviously contemplates that such acts may be done *after* the expiration of the sixty-day period. Otherwise, why have a waiting period at all? Only the most tortuous and illogical reasoning could arrive at the conclusion in the face of this language that the lockout was *per se* unlawful in any event. Such, of course, is not the case.

The Congress recognized that the lockout did in fact exist and was a recognized economic weapon in the conduct of collective bargaining negotiations, firmly established at common law and recognized by the Restatement of Torts, by many judicial opinions and by many non-legal experts and publications. (Petitioners' Opening Brief pp. 12-17.)

Congress also recognized, we believe, that Organized Labor itself considered that the lockout was and is the corollary and legitimate counterpart of the strike. (Petitioners' Opening Brief pp. 18-20.)

As further evidence of the recognition and acceptance of the lockout by Organized Labor itself we call the attention of the Court to the terms of the "Basic Steel Agreement" dated July 24, 1952, settling the gigantic steel strike which had paralyzed virtually the entire steel industry in the United States. Section 7 of the "Basic Steel Agreement" reads as follows:

> "New agreements to run to June 30, 1954, reopenable by either party as of June 30, 1953, on

> the subject of general adjustment of wage rates only, with the right to strike or lockout after June 30, 1953, upon appropriate notice."

The Board is apparently blissfully sleeping in its ivory tower while life, including the vigorous steel strike and the highly publicized settlement thereof, goes on about it.

The remainder of the opinion of the Board deals more with philosophical arguments rather than with interpretation or construction of the language of the statute. For this reason it will be discussed but briefly. The majority of the Board attempts to disprove the dissenting opinion filed by the chairman of the Board which declares that "the employers did no more than defend themselves with commensurate weapons in their attempt to resist—to do battle—and to win". In answer to this the majority opinion points out that the union has only one effective weapon—its ancient and protected right to strike—whereas, according to a majority of the Board the employer may lawfully meet the challenge by replacing the strikers. The majority opinion continues:

> "Even if the employer is unable to get replacements to permit continued operations in the face of the strike, he is generally in no worse position than the strikers. Both adversaries in the conflict would in such a case be under the same economic pressure to terminate the strike and restore the flow of wages and profits. We see no reason in equity or justice to give to employers the privilege of extending the hardship and depri-

> vations of industrial conflict to areas not directly involved, nor could such a privilege be squared with the basic policy of the statute to minimize industrial strife and interruption to commerce."

It is appalling to contemplate that the National Labor Relations Board, or rather a majority thereof, in this enlightened day and age of advanced, accepted, and civilized collective bargaining, solemnly declares that the only course which an employer or employer group may legitimately, legally, and appropriately follow in the case of a strike is to "break the strike" by means of replacing the strikers.

It is obvious that a successful breaking of the strike in this manner very often *would also break the union* in the plant of the employers. Yet this is what a majority of the Board stoutly insists is the *only legitimate* counterpart by the employer of the union's economic weapon of the strike.

To illustrate the disservice which a majority of the Board is doing to collective bargaining, we call the attention of the Court to the fact that a special commission was dispatched by President Roosevelt in 1938 to investigate industrial relations in Great Britain and in Sweden. The members of that commission discovered that in these countries, after going through virtually the same initial stages of strike breaking by replacing the strikers, both sides concluded, as the collective bargaining process reached maturity, that the better way to settle a dispute when an impasse was reached was to shut down and "sit it

out rather than to slug it out'' until an agreement was perfected. We particularly stress the fact that such was the conclusion of *both* sides, namely, both labor and management.

Illustrative of the conclusions reached by the President's commission, we quote paragraph 36 of the President's Commission's Report on Great Britain, and paragraphs 2 and 32 of the Commission's studies in Sweden:

> "36. For the most part the conduct of strikes has been accompanied, at least since collective bargaining became generally accepted, by relatively little violence or provocation. In the case of strikes involving at the outset enough workers to make a continued operation of a plant impractical, employers almost invariably shut down their plants and do not attempt to operate until the controversy has been settled by negotiation. Several reasons for this practice were given us. In the first place, in the strongly organized industries it is difficult to obtain replacements, but even where organization is not extensive there is a general feeling among workers and employers that 'the job belongs to the man' and that it is not right for men to take, or to be asked to take, the jobs of their fellows. Secondly, collective bargaining having been generally accepted, there is confidence on both sides that the controversy will be settled by peaceful negotiations, and a desire on both sides to effect a resumption of work under circumstances as free from bitterness as possible, so that future strife maye be avoided.''

"The Commission's Studies in Sweden.

"2. For the most part employers in Sweden are organized to deal with labor matters in industry-wide associations. Most of these associations are members of the Swedish Employers Federation. The workers are organized in national unions, and these are members of the Swedish Confederation of Trade Unions. We conferred at length with the leaders of these two major organizations as well as with several leaders of national employers associations and of national unions. We also met with individual employers, both within and without these organizations."

"Employers Ban Strike-breakers.

"32. In 1931 there was a severe strike in the lumber region where strike-breakers were introduced. The military was called in and five deaths resulted. We were told by officers of the Employers Federation that this so shocked the people that no such attempt would again be made to use strike-breakers; and employers' representatives and union officials concurred in the opinion that unless there was a general strike against the government the military would not again be called out. In 1933 there was a strike in the building industry which lasted for nine months, but it was not accompanied by the use of strike-breakers or by violence. While we were in Sweden an extensive strike and lockout in the printing trade was under way, which the government conciliation machinery had not been able to settle. There had been no violence, and no one expected that there would be any. Although the dispute had been exhaustively examined by the govern-

> ment conciliators with whom we talked, there had been no proposal to arbitrate because, as we were informed, neither side would accept arbitration. The feeling seemed to be that the parties would find a correct settlement in due course."

It is ironic when employers in this area have been applauded for resorting to the lockout (which necessarily guarantees the right to return to work of all employees locked out) instead of resorting to the strike-breaking methods of replacing strikers, to be told by the National Labor Relations Board that the lockout is not a legitimate weapon and the only legitimate answer to a strike is to protect the strike by replacing the strikers and thereby *breaking the strike,* and, perhaps, the union.

We respectfully submit that neither the express language of Section 8(a)(1) and Section 8(a)(3) nor the philosophy of the legislation in which it is embodied requires such a conclusion.

This Court, while indicating its views on the matter so plainly as not to be misunderstood, has deferred to the Board in permitting the Board to make its decision in the first instance. It is respectfully submitted that the decision and opinion of the Board not only fails to reveal any reason why this Court should depart from its original ruling in this case, but the very illogic and impracticability of the reasoning in the Board's opinion demonstrates more conclusively than ever that the facts before the Court on this record do not constitute an unfair labor practice.

For the foregoing reasons petitioners respectfully pray that the request for enforcement of the order of the National Labor Relations Board be denied.

Dated, February 20, 1953.

Respectfully submitted,

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